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CURRENT TOPICS.

The case of Kane v. Stone Co., recently decided by the Supreme Court of Ohio, is an illustration of the relaxation of the strict common law rule with reference to the recovery upon a contract, where there has been a substantial compliance with its terms. There the action was for a balance alleged to be due for the stone work done upon a building. The defense was that the stone supplied was not of the quality stipulated for. It was held that the plaintiff was nevertheless entitled to recover the amount contracted for, less the damage sustained by the failure to strictly comply with the terms of the contract. Say the court: "Formerly there could be no recovery on a contract like this, unless the agreement was strictly performed. But the rigid rule upon this subject has been relaxed, and now where the builder acts in good faith there may be such recovery, although there may not have been literal performance. Goldsmith v. Hand, 26 Ohio St. 101; Mehurin v. Stone, 37 Ohio St. 49. What is essential and indispensable to a recovery is substantial compliance with the agreement. This is not a suit on a *quantum meruit*, but an action on the contract. No evidence was offered as to the value of the work or materials, but evidence was offered as to damages that may have been sustained by the failure to strictly comply with the agreement. The action is properly prosecuted on the contract, and the measure of recovery is the sum stipulated in the agreement, less the damages sustained by a failure to strictly perform. Nolan v. Whitney, 88 N. Y. 648." We hope that it will not be considered old-fogyism to regard this departure from the rules of the common law as of questionable wisdom. The phrase "substantial performance of a contract," is of such elastic nature that injustice will necessarily result from such looseness of expression. Either the contract is performed or it is violated. "Substantial performance" smells afar of evasions and excuses. It is a phrase of those who regard excuse for failure as equivalent to successful accomplishment. The common law wisely and logically denied the right of action upon a contract to him who had violated the contract; but in order to do exact justice, permitted him to recover for work actually done, not at the stipulated rate of the contract, but such a sum as it was reasonably worth,—a *quantum meruit*. This seems to us to be an instance in which modern innovation is not a modern improvement.

The case of Hynes v. McDermott, recently decided by the New York Court of Appeals (opinion by Andrews, J.), while in no sense novel in doctrine, contains one of the aptest statements of the doctrine that a presumption of marriage arises from cohabitation, that we can remember to have seen. It is as follows: "These circumstances—cohabitation, family life, declarations of the parties, repute of marriage—while they do not constitute marriage, evidence it, because they are the circumstances which usually attend and characterize that relation, and the cohabitation having commenced in England, the presumption is that the marriage was contracted in accordance with the forms and requirements of the English law. * * * * * The presumption of marriage from a cohabitation apparently matrimonial is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality and not immorality; marriage and not concubinage; legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence to the contrary." Citing to support this view: Morris v. Davies, 5 Clk. & Fin. 163; Piers v. Piers, 2 H. L. Cas. 331; Fenton v. Reed, 4 Jones, 51; Rose v. Clark, 8 Paige, 574; Canjole v. Ferrie, 23 N. Y. 90; De Thoren v. Attorney-General, L. R. 1 App. Cas. 686.

MARRIED WOMEN'S DEBTS.

Under the common law a married woman could not make a contract or incur an indebtedness,[1] except in a few cases of necessity,[2] such as when her husband is civilly dead, abjured the realm, in some cases of separation, and when she could act as a trader; for the reason that the common law considered her status merged in that of her husband.[3] The wife was, however, allowed to make certain contracts as the agent of the husband, expressed or implied from the relationship of husband and wife, which will be binding on the husband;[4] and she could bind herself for wrongs and frauds committed by her during coverture, but not when the tort is connected with contract.[5] This was her status at common law. In courts of equity it was different.[6] Within the jurisdiction of these courts, in the administration of trusts, a married woman could be vested with a separate estate, which was created for the purpose of excluding the common law marital rights of the husband, and secure to the wife an independent estate and income.[7]

To every estate an interest in property held by a person *sui juris*, the common law attached the right of alienation—the *jus disponendi*—which right equity did not, at this time,[8] question; and as a married woman was recognized by courts of equity to be *sui juris* as to her separate estate, she had, as to that estate, the right of alienation—the *jus disponendi*—a right admitted and acted upon until Lord Thurlow introduced the provision against alienation.[9] Hence, down to this period a married woman was recognized in courts of equity as a *feme sole quoad*, the capacity to enjoy and the capacity to dispose of that estate; and after this period, the courts regarded her as a *feme sole quoad*, the capacity to enjoy and dispose of this estate if not restrained by the instrument which created such separate estate.[10]

Subsequent to Pybus v. Smith, and Hulme v. Tenant, the trusts creating a separate estate vested in a married woman either an unlimited or limited interest therein. If she received an unlimited interest, she had an unlimited power. If she received a limited interest, questions as to her capacity to contract debts and to dispose of her estate arose out of three classes of cases:[11] First, when the instrument conferred the estate for life, with a general power of appointment; second, when for life, with a special power of appointment;[12] third, when the power of appointment was not exercised. Within these classes of cases come nearly all, if not all, the adjudications upon the questions of a married woman's capacity to contract debts and to dispose of her separate estate. And after a very considerable conflict it was held that the grant of the power to enjoy and the power to dispose in a certain manner or mode, did not exclude the right to exercise any other mode of disposition or enjoyment, on the ground that the words used in these three classes of appointments were mere words of

[1] Marshall v. Rutton, 8 T. R. 547; Benj. on Sales, secs. 31-37; Pollock on Cont., sec. 22; Addison on Cont., sec. 21; Chitty on Cont., sec. 19; 2 Roper H. & W. 235.

[2] Carroll v. Blencoe, 4 Esp. 27; Dewolf v. Braune, 1 H. & N. 178; 25 L. J. Ex. 348; Derry v. Mazarine, 1 Ld. Ray, 147; Chitty on Cont., sec. 182; Wolford v. Duchess of Pierne, 2 Esp. 554; Franks v. Franks, 2 Esp. 554; 1 Bos. & P. 357; 3 Camp. 123; Bateman v. Countess of Ross, 1 Dow. 235; Vansittard v. Same, 4 K. & J. 62; 27 L. J. Ch. 222, 289; 2 DeG. &. J 249.

[3] Fairhurst v. London Loan Ass'n, 9 Ex. 422; 23 L. J. Ex. 164; Clayton v. Adams, 6 T. R. 605; Marshall v. Rutton, 8 T. R. 545; Murray v. Barlee, 3 Myl. & K. 221; Cannam v. Farmer, 3 Ex. 698; Pittam v. Foster, 1 B. & C. 248; Pollock on Cont., sec. 24; 1 Wm. Saunders, 172.

[4] Manby v. Scott, 2 Sm. L. Ca. 440.

[5] Wright v. Leonard, 11 C. B. 248; 30 L. J. C. P. 365.

[6] Hulme v. Tenant, 1 Bro. C. C. 20; Socket v. Wray, 4 Bro. C. C. 485; Nantes v. Carrock, 9 Ves. 189; Jones v. Harris, 9 Ves. 496; Stuart v. Kirkwell, 3 Mad. 388; Francis v. Wizzell, 1 Mad. 258; Owens v. Dickinson, 1 Cr. & Ph. 48; Murray v. Barlee, 3 M. & K. 219.

[7] Norton v. Turville, 2 P. Wms. 144; Peacock v. Monk, 2 Ves. 193; Aylette v. Ashton, 1 M. & C. 105; Taylor v. Meads, 34 L. J. Ch. 203; Owens v. Dickinson, 1 Cr. & Ph. 48; Cases cited in 2 Story Eq. Jur., sec. 1397.

[8] Prior to case of Pybus v. Smith, 3 Bro. C. C. 340.

[9] To protect Miss Watson in Pybus v. Smith, *supra*; Parkes v. White, 11 Ves. 222; Atcheson v. Lemann, 33 L. T. 302; Adams v. Gamble, 12 Ir. Ch. 102; Pride v. Bubb, 7 Ch. 64.

[10] Pybus v. Smith, 3 Bro. C. C. 340; Hulme v. Tenant, 1 Bro. C. C. 20; Grigby v. Cox, 1 Ves. 517; Allen v. Papworth, 1 Ves. 163; Peacock v. Monk, 2 Ves. 190; Murray v. Barlee, 3 Myl. & K. 220; Vaughn v. Vanderstegen, 2 Drew, 180; Newcomer v. Hassard, 4 Ir. Ch. 274; Johnson v. Gallagher, 3 DeG. F. & J. 515; Leeds Banking Co. Case, 3 L. R. Eq. 787; Butler v. Cumpston, L. R. 7 Eq. 20; Picard v. Hine, L. R. 5 Ch. App. 274; Shattock v. Shattock, L. R. 2 Eq. 182; Wright v. Chard, 4 Drew. 685; Chubb v. Stretch, L. R. 9 Eq. 555.

[11] See Johnson v. Gallagher, and Shattock v. Shattock, *supra*, where the division can be made upon a review of all the cases.

[12] Such as by will or by deed.

enlargement of the grant, and the rule was therefore laid down that the grant of an absolute right to enjoy carried with it an absolute power to dispose.[13]

Having reached this point, the courts paused, and refused to concede the capacity to contract debts for which the separate estate would be held liable, although it followed as a necessary conclusion from the premises, that to the extent of the capacity to enjoy and dispose, she should have the capacity to contract debts for which her estate should be liable. The reason for this was, that as she is a *feme sole* only with respect to her separate estate, and not a *feme sole* to incur debts generally, she, in the exercise of the power to dispose—the *jus disponendi*—acts with respect to, and with direct effect upon the separate estate, and thus exhibits her manifest intention to deal with it; but in contracting debts generally, such contracts do not refer to or directly affect her separate estate. Hence in the former instance, the separate estate was the subject-matter of the *jus disponendi*, and in the latter instance it was not. It was therefore advanced that with respect to her separate property, a married woman had the same capacity to enjoy and to dispose as if unmarried,[14] and could fasten a specific charge, such as a mortgage, trust or other lien, upon such separate estate, this being an exercise of the *jus disponendi*.[15] In this condition, the case of Hulme v. Tenant,[16] held that the separate estate is liable for her bond, and the *dictum* that it was liable for her debts, the court stating that a married woman not only had the *jus disponendi* as when she contracted that this or that portion of the estate should be disposed of in this or that way, and also that the personal estate was liable for her contracts and debts, but not the *corpus* of the realty.

This case was subsequently questioned and doubted,[17] and disapproved on principle,[18] on the ground that the doctrine "that with respect to her separate estate, a married woman is a *feme sole*," means that she is a *feme sole*, *quoad* the capacity to enjoy and the capacity to dispose of her separate estate, and not that she has the general power to contract the same as if *sole;* because the possession of a separate estate did not and could not, *per se*, give the general power to contract which she had before marriage; but did confer the capacity to enjoy and dispose, and therefore make the separate estate liable for a bond or other obligation which does not refer or relate to the property, but merely a personal contract, is to give force and effect to a void contract, and to attach to the *jus disponendi* an element which does not belong to it.[19]

Here, then, are two views; one, that the separate estate is liable for her bonds; the other, that it is only liable when she makes them a specific charge, such as a mortgage or lien, this being the exercise of the *jus disponendi*.[20] This ruling that the separate estate was liable for her bonds, was followed,[21] and then extended to her note,[22] and her bill of ex-

[13] Caverly v. Dudly, 3 Atk. 541; Sockett v. Wray, 4 Bro. C. C. 483; Hyde v. Price, 3 Ves. 437; Milne v. Bush, 3 Ves. Jr. 488; Whistler v. Newman, 4 Ves. 129; Essex v. Atkins, 14 Ves. 542; Sturgiss v. Carp, 13 Ves. 190; Parkes v. White, 11 Ves. 222; Witts v. Dawkins, 12 Ves. 501; Sperling v. Rochfort, 8 Ves. 175; Jones v. Harris, 9 Ves. 497; Stuart v. Kirkwall, 3 Mad. 112; Nurse v. Craig, 5 B. & P. 162; Field v. Sowle, 4 Russ. 112; Bullpin v. Clark, 17 Ves. 365; Heatley v. Thomas, 15 Ves. 596.

[14] Hulme v. Tenant, 1 Bro. C. C. 20; Grigby v. Cox, 1 Ves. 517; Allen v. Papworth, 1 Ves. 163; Peacock v. Monk, 2 Ves. 190; and Lord Brougham's opinion in Murray v. Barlee, 3 Myl. & K. 220.

[15] Bolton v. Williams, 2 Ves. Jr. 150; Greatley v. Noble, 3 Mad. 94; Stuart v. Kirkwall, *supra;* Aguilar v. Aguilar, 5 Mad. 414.

[16] The question in this case was whether the wife's general bond, executed jointly with her husband, will bind the separate estate, and Lord Thurlow held that the personalty, and rents and profits of the realty were liable, but as the cases had not gone so far as to hold the *corpus*, he would not go that far. Citing Allen v. Papworth, Grigby v. Cox, Norton v. Turvill, *supra*.

[17] Nantes v. Carrock, 9 Ves. 188; Jones v. Harris, 9 Ves. 497; Sperling v. Rochfort, 8 Ves. 175; Parkes v. White, 11 Ves. 221; Whistler v. Newman, 4 Ves. 129. Lord Thurlow was followed in Heatley v. Thomas, 15 Ves. 596; Bullpin v. Clark, 17 Ves. 365. See Kelly's Contracts of Married Women.

[18] Bolton v. Williams, 2 Ves. Jr. 138; Jones v. Harris, 9 Ves. 486; Angel v. Hadden, 2 Mer. 164; Aguilar v. Aguilar, 5 Mad. 414. Lord Eldon, in Nantes v. Corrock, said that Hulme v. Tenant was a prodigiously strong case; and Lord Rosslyn, in Whistler v. Newman, strongly disapproved it.

[19] See the opinions in Jones v. Harris, Greatley v. Noble, Stuart v. Kirkwall, Sockett v. Wray.

[20] Because a married woman can not make a contract, but can make a disposition. Marshall v. Rutton, 8 Term. R. 547. See Greatley v. Noble, 3 Mad. 39; Lillie v. Airey, 1 Ves. Jr. 277; Tullet v. Armstrong, 4 Beav. 323; Biscoe v. Kennedy, 1 Bro. C. C. 17; Dillon v. Grace, 2 Sch. & Lef. 456.

[21] Lillie v. Airey, Tullet v. Armstrong, Biscoe v. Kennedy, *supra*.

[22] Bullpin v. Clarke, 17 Ves. 365; Field v. Sowle, 4 Russ. 112; Fitzgibbon v. Blake, 3 Ir. Ch. 328. See Gregory v. Lockyer, 6 Mad. 99; Clarke v. Miller, 2 Atk. 370; Nail v. Punter, 5 Sim. 562.

change,[23] and subsequently to any writing,[24] on the ground, not as stated in Hulme v. Tenant, but that such bond, note, bill or writing was an equitable appointment—an exercise of the *jus disponendi*—and not a general engagement or personal contract, because the writing was given to be effective, which could only be done by holding the separate estate liable.[25] Another class of decisions asserted that this liability existed because such contracts were debts and as incident to ownership.[26] At this point one class of decisions put the ground of liability on the *jus disponendi*, and another class, that it was incident to ownership.[27] Subsequently the cases repudiated this distinction, and held that such obligations were not the exercise of the power of appointment, or the *jus disponendi*, for the reason that such obligations do not refer or relate to the separate estate; that they are contracts to pay, and not to pay out of a particular estate; and that they are paid *pari passu*.[28] In explanation of this, Lord Brougham[29] stated that at first nothing could touch the separate estate but a real charge,[30] such as a mortgage, etc. Afterwards the courts only required to be satisfied that the married woman only intended to deal with her separate estate by an expressed intention or an implied intention, as when she executed a bond, or made a note, or accepted a bill; hence, when her writing contained an express charge, there was no doubt of her intention, and when she executed a written personal obligation, the court implied the intention, and therefore in both cases it was a question of intention.[31] And Lord Cottenham[32] said that a writing is operative upon the separate estate, not by way of the execution of a power, because such writing does not refer to the power, nor to the subject-matter of the power, nor indeed, in many cases, has there been any power at all. It is clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power. It has sometimes been treated as an exercise of the *jus disponendi*, but the contract is silent as to the estate, and the note, bond, etc., is merely a contract to pay, not a contract to pay out of a particular property; and the correct principle is that the separate estate is a creature of equity, with which a married woman has the power to deal; and if she has this power, she has the other power incident to property, namely, the power of contracting debts to be paid out of it.[33] This ruling has been followed[34] and settled that there is no difference or distinction between a married woman's general personal contracts in writing, such as her bond, note or bill, and her general personal contracts not in writing. Both are debts, express contracts or promises to pay, and both are general engagements; the difference being only in the form. In one case,[35] the court

[23] Stuart v. Kirkwall, 3 Mad. 387; Coppin v. Gray, 1 Y. & C. Ch. 205; McHenry v. Davies, 10 L. R. Eq. 88; Dawson v. Prince, 4 Jur. N. S. 497.

[24] Masters v. Fuller, 1 Ves. Jr. 513; Vaughan v. Vanderstegen, 2 Drew. 180; Gaston v. Frankum, 2 DeG. & S. 561; Murray v. Barlee, 4 Sim. 82; 3 Myl. & K. 209; Callow v. Howle, 1 DeG. & Sm. 531; *In re* Pugh, 17 Beav. 336; Crosby v. Church, 3 Beav. 489.

[25] The reasoning is given in Shattock v. Shattock, L. R. 2 Eq. 182, and in Matthewman's Case, L. R. 3 Eq. 787.

[26] Parteriche v. Powlet, 2 Atk. 383; Allen v. Papworth, 1 Ves., Sr. 163; Hearle v. Greenbank, 1 Ves., Sr. 298; Grigby v. Cox, 1 Ves., Sr. 517; Peacock v. Monk, 2 Ves., Sr. 190; Pawlet v. Deleval, 2 Ves., Sr. 663; Newman v. Cartony, 3 Bro. C. C. 346; Hulme v. Tenant, 1 Bro. C. C. 16; Norton v. Turville, 2 P. Wm. 144; Masters v. Fuller, 4 Bro. C. C. 19; Bell v. Hyde, Prec. Ch. 328.

[27] Bolton v. Williams, 2 Ves., Jr. 142; Whistler v. Newman, 4 Ves. 145. Sir John Leach, in Greatley v. Noble, Stuart v. Kirkwall, Aguilar v. Aguilar, Field v. Sowle, Chester v. Platt. Vice-Chancellor Shadwell, in Murray v. Barlee, 4 Sim. 82. See Digby v Irvine, 6 Ir. Eq. 149; Shattock v. Shattock, L. R. 2 Eq. 182; Harris v. Mott, 7 Eng. L. & Eq. 245.

[28] Murray v. Barlee, 3 Myl. & K. 209; Owens v. Dickenson, Cr. & Ph. 48; Vaughan v. Vanderstegen, 2 Drew. 182; Wilcox v. Hannyngton, 5 Irish Ch. 46; Bolden v. Nickolay, 3 Jur. N. S. 885; Wright v. Chard, 4 Drew. 673; Newcomb v. Hassard, 4 Ir. Ch. 274; Shattock v. Shattock, L. R. 2 Eq. 182.

[29] In Murray v. Barlee.

[30] See Clarke v. Miller, 2 Atk. 379; Willat v. Clay, 2 Atk. 67; Dowling v. Maguire, Plunk. 19; Clinton v. Willis, 1 Sug. Pow. 208; Kenge v. Deleval, 1 Vern. 326; Norton v. Turville, 2 P. Wm. 144; Stanford v. Marshall, 2 Atk. 68; Master v. Fuller, 4 Bro. C. C. 19; Stead v. Nelson, 2 Beav. 245; Bailey v. Jackson, Cooper R. 495; Francis v. Wizzell, 1 Mad. 261; Crosby v. Church, 3 Beav. 489; Tullet v. Armstrong, 4 Beav. 323.

[31] See Crosby v. Church, 3 Beav. 485; Brown v. Bamford, 11 Sim. 127.

[32] In Owens v. Dickenson, Cr. & Ph. 53.

[33] This is the ruling in Peacock v. Monk, and Norton v. Turville, extended in Hulme v. Tenant, but denied in Jones v. Harris, Aguilar v. Aguilar, Greatley v. Noble. And see Hughes v. Turner, 3 Myl. & K. 690; Hunlocke v. Gill, 1 Russ. & M. 515; Curtis v. Kenrick, 9 Sim. 443.

[34] Johnson v. Gallagher, 3 DeG. F. & J. 515; Leeds Banking Co. Case, 3 L. R. Eq. 787; Butler v. Cumpston, L. R. 7 Eq. 20; Picard v. Hine, L. R. 5 Ch. App. 274; Wright v. Chard, 4 Drew. 685; Chubb v. Stretch, L. R. 9 Eq. 555.

[35] Lord Brougham, in Murray v. Barlee.

stated that there is no principle for a distinction between a married woman's contracts in writing and those not in writing. If she can charge the estate by a written instrument void at law, she can charge it by parol, there being no equity, reaching written dealings with the property, which do not extend to dealings in other ways. In another case,[36] it was stated that it was certainly wrong in principle to admit a distinction between a contract in writing and one not in writing; and in another case,[37] the court said that the authorities now are that there is no distinction between written and verbal contracts.

So long as it was maintained that a married woman's contracts, operated by way of disposition, and as a disposition is an assignment of a trust, there seemed to be room for contending that such contract should be in writing;[38] but as soon as it is established that her personal contracts in writing do not operate by way of disposition, but are binding on the estate because they are debts, it must follow that her personal contracts not in writing, are also binding because they are debts. Where a promise is implied from the acts of a married woman which could be construed as intended to bind either her husband or herself, there is, then, room for a distinction; but an express promise to pay in writing, and an express promise to pay not in writing, must stand so far as the promise is concerned, on the same footing.[39] The cases which abolished the distinction between written and verbal contracts, enunciated the doctrine of intention.

To recapitulate, the early cases placed the liability on the ground that such contracts were debts.[40] Subsequent cases held that a married woman was not liable on her implied contracts, such as for the repayment of money paid by mistake, or paid on a worthless annuity, or for rent wrongfully paid, because there was no expressed intention on her part to charge the estate, or no expressed intention to make the estate liable, whilst the reasoning seemed to indicate that nothing but a specific charge would bind the estate.[41] About the same period, the courts held the estate liable for her note, bill or any written obligation, on the ground of her implied intention, stating that a written obligation is the exercise of the *jus disponendi*, and intended to be effective and a charge on the estate, hence the obligation to bind was conclusively presumed.[42] So that at this period it was established that a married woman's written obligation is binding on her separate estate, because her intention to charge the estate is conclusively presumed; and her verbal contracts are binding when she expressly stipulates that such contracts will be a charge on the estate; the former being an implied intention, and the latter an expressed intention.[43] Subsequent cases[44] admitted the rule, but repudiated the reasons given for it, because both the written and verbal general contracts were void at law, and neither are the exercise of the *jus disponendi*. Both are personal contracts, one evidenced by a writing, the other not. If the intention is implied, such intention must be drawn from the

[36] Owens v. Dickenson, *supra*.

[37] Matthewman's Case, L. R. 3 Eq. 787.

[38] See Clinton v. Willis, 1 Sug. Pow. 208; Clerk v. Miller, 2 Atk. 379; Dowling v. Maguire, Plunk, 19.

[39] See Bolton v. Williams. 2 Ves. Jr. 142; Greatley v. Noble, 3 Mad. 94; Stuart v. Kirkwall, 3 Mad. 389; Chester v. Platt, 1 V. & B. 324; Murray v. Barlee, 4 Sim. 82.

[40] Kenge v. Deleval, 1 Vern. 326; Norton v. Turville, 2 P. Wm. 144; Stanford v. Marshall, 2 Atk. 68; Clerk v. Miller, 2 Atk. 379; Clinton v. Willis, 1 Sug. Pow. 208; Grigby v. Cox, 1 Ves. 517; Allan v. Papworth, 1 Ves. 163; Peacock v. Monk, 2 Ves. 193; Hulme v. Tenant, 1 Bro. Ch. 16; Lillia v. Airey, 1 Ves. Jr. 279; Angel v. Hadden, 2 Mer. 163; Gregory v. Lockyer, 6 Mad. 90.

[41] Bolton v. Williams, 4 Bro. Ch. 297; Aquilar v. Aquilar, 5 Mad. 414; Greatley v. Noble, 5 Mad. 418; Jones v. Harris, 9 Ves. 486; Callow v. Howle, 1 DeG. & Sm. 531; Wright v. Chard, 4 Drew, 673; Shattock v. Shattock, 2 L. R. Eq. 182; Hodgnes v. Hodgnes, 4 C. & F. 323; Lumb v. Milnes, 5 Ves. 520. See Court v. Jeffrey, 1 Sim. & Stu. 105; Nelson v. Booth, 5 W. R. 722; *Ex parte* Luard, 8 W. R. 73; Matthewman's Case, L. R. Eq. 78; Hartford v. Powers, 3 Ir. Eq 602; Picard v. Hine, L. R. 5 Ch. Ap. 274.

[42] Whistler v. Newman, 4 Ves. Jr. 129; Sperling v. Rochford, 8 Ves. 175; Jones v. Harris, 9 Ves. 497; Stuart v. Kirkwall, 3 Mad. 112; Nurse v. Craig, 5 B. & P. 162; Field v. Sowle, 4 Russ. 112, Bullpin v. Clark, 17 Ves. 365; Heatley v. Thomas, 15 Ves. 596; Power v. Bailey, 1 B. & B. 49; Wagstaff v. Smith, 9 Ves. 520.

[43] Thornycroft v. Crocket, 2 H. L. Cas. 239; La Touch v. La Touch, 8 H. & C. 576; Owen v. Homan, 4 H. L. Cas. 997; McHenry v. Davis, 6 L. R. Eq. 462; Waugh v. Waddell, 16 Beav. 521; Brown v. Like, 14 Ves. 302; Harris v. Mott, 7 Eng. L. & Eq. 245; Crosby v. Church, 3 Beav. 489; Tullet v. Armstrong, 4 Beav. 319. In 1853, Shattock v. Shattock, *supra*, held this ruling.

[44] Vaughan v. Vanderstegen, 2 Drew, 182; Murrey v. Barlee, 3 Myl. & K. 209; Owens v. Dickenson, Cr. & P. 48; Wilcox v. Hannyngton, 5 Ir. Ch. 46; Bolden v. Nickolay, 3 Jur. (N. S.) 885; Newcomer v. Hassard, 4 Ir. Ch. 274; Johnson v. Gallagher, *supra*.

contract, not from the evidence of the contract, and, therefore, if from a contract evidenced in writing, the intention to charge is drawn; on the same principle, the same intention should be drawn from a contract not evidenced in writing; hence it was advanced, but not adjudged as a logical conclusion, that to the extent of the capacity to enjoy and dispose, a married woman has the capacity to contract debts for which the separate estate would be liable.[45] It was, therefore, settled that contracts containing an expressed intention to charge will bind the separate estate, and also her written obligations. The difficulty has been, and is, whether her parol contracts, made without any express intention to charge, are valid and binding.[46]

In entering into such a contract, a married woman occupies a dual position, one when she acts and contracts for on behalf of her husband in those domestic contracts for which the law holds him responsible; and the other when she acts and contracts for and on behalf of herself, for which equity hold her separate estate liable. When she enters into a general engagement the presumption is (and so the law declares), that it was made for and on behalf of her husband; and to show that it was made for and on behalf of herself, for which her separate estate should be liable, something more than the mere obligation should be shown. What that something more is, depends on the circumstances of each case. What would bind the estate when a married woman lived separate and apart from her husband, would not bind it where she lived with him; and what would bind it if the credit is given to the married woman, will not bind it if the credit be not so given. If these premises are correct, the conclusion follows that a married woman's general engagements are binding on the separate estate when she intended to contract so as to make the estate the debtor, and such intention will be presumed when she lives separate and apart from her husband.[47]

[45] Matthewman's Case, *supra*; Johnson v. Gallagher, 3 DeG., F. & J. 515.

[46] Bank of Australia v. Lempriere, 4 Privy Council Appeals, 593; Aylett v. Ashton, 1 Myl. & Cr. 105.

[47] Leeds Banking Co. Case, 3 L. R. Eq. 787; Butler v. Cumpston, 7 L. R. Eq. 20; Hartford v. Powers, 3 Ir. Eq. 652; Picard v. Hine, 5 L. R. Ch. App. 274; Bank v. Lempriere, L. R. 4 P. C. App. 591; Manby v. Scott, 2 Sm. L. Cas. —; Mayd v. Field, L. R. 3 Ch. Div. 593.

Lord Justice Turner said,[48] that to bind the estate by a general engagement it must be made with reference to and upon the faith and credit of the estate, and whether it was so or not, depends upon the facts in the case. Vice-Chancellor Kindersley said[49] that the estate would be liable if the married woman purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting. Lord Justice James,[50] Vice-Chancellor Malins[51] and Lord Brougham,[52] held the same views and reasoning.

A married woman with a separate estate is not a *feme sole* in every respect, but only a *feme sole* with respect to her separate estate; that is, a *feme sole* to enjoy and dispose of it, and a *feme sole* to make obligations and incur debts with respect to it, not generally and in every respect as if unmarried, but with respect to the separate estate. This can be done when she in her contract expressly stipulates that such is the case, or when she refers to the separate estate, or when the contract is made on the faith and credit of the estate, or for the benefit of the estate. The general rule, therefore, is, that a married woman with a separate estate can make, and such estate will be liable therefor, all contracts, made, not on her husband's account, nor by her as his agent, but on her own account, with respect to the separate estate, so as to make the separate estate the debtor; and within this rule is placed her general personal contracts in writing, because the courts have held that such writing was made with respect to her separate estate. Hence, such general engagements as can be construed to have been made on her husband's account, or by her as his agent, the husband is *prima facie* liable, and, when living apart, they are *prima facie* her own; and hence it follows that in all that relates to the transaction, the ordinary rules of contract and limitation apply. A contract not binding on a person *sui juris* will not take effect against the estate. The creditor must first show a legal debt, as

[48] In Johnson v. Gallagher, *supra*.

[49] In Matthewman's Case, *supra*.

[50] In Bank of Australia v. Lempriere, *supra*.

[51] In Butler v. Cumpston, *supra*.

[52] In Murray v. Barlee, *supra*.

if she were *sui juris*, and then he must show by proof or presumption that the contract was made with respect to the estate, or its equivalent, or intention to hold the estate liable. And hence, too, when the contract, or general engagement, is made with express reference to alleged separate estate, or to the expectation of getting separate estate, such obligation is good by way of estoppel, and will bind future acquisitions,[53] but not otherwise, and accordingly the creditor must show that the engagemet was made on the faith and credit of the supposed separate estate. And when a married woman becomes *sui juris* by her husband's death, by divorce, or otherwise, her creditor can follow the separate estate as it existed at the date she became *sui juris*.[54] The foregoing are the English rules. The rule in the United States follows.[55]

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Bellaire, Ohio.

[53] Sharpe v. Fox, 4 Ch. 35; *Re* Lush Trust, 4 Ch. 591; Cannon v. Farmer, 3 Ex. 698.
[54] Ivens v. Butler, 7 E. & B. 159; 26 L. J. Q. B. 145; Joy v. Amphlet, 1 H. & C. 637; 32 L. J. Ex. 176; Dillon v. Cunningham, L. R. 8 Ex. 23; Chubb v. Stretch, 9 Eq. 555.
[55] See Kelly on Contracts of Married Women, ch. 8.

MORTGAGES AND POWERS OF SALE.

The purpose of this article is to sketch *currente calamo*, the history of the relation of mortgagor and mortgagee, from early times to the present day, with a view to determining, as nearly as may be, the scope and limitations of a power of sale, now usually inserted in instruments of mortgage, and more particularly, whether or not restrictions on the power will attach to the other concurrent remedies of the mortgagee. The importance of this inquiry will be manifest, when it is remembered that it is customary to stipulate that the property shall not be sold under the power until a certain time after default. Can the mortgagee foreclose his mortgage before the expiration of this period of time?

1. *A Mortgage at Common Law* was an estate on condition subsequent,[1] or an "interest in land granted on express condition, whereby the estate in the mortgagee might be defeated on an uncertain event."[2] Its peculiarity as an estate upon condition lay in the fact that the uncertain event was always the performance of some obligation of the mortgagor, for which the mortgage was intended as a security.[3] Forfeiture was the failure of the mortgagor to perform this obligation. Its effect was to make the estate absolute in the mortgagee, however great the discrepancy between the value of the property and the amount of the debt. Such great hardship was involved in the operation of the theory of conditions, as applied to mortgages, that the courts of equity found it necessary to interfere, to protect the mortgagor from the effect of forfeiture.

2. *In Equity* the nature of the transaction rather than the form of the instrument, was regarded, and as the contract was nothing more than a pledge of land, to secure the performance of some act, the mortgagor was permitted to redeem his property, notwithstanding a forfeiture, if, within a reasonable time thereafter, he complied with his obligation.[4] As a check upon this power of redemption, the mortgagee was allowed to foreclose his mortgage, after such delay as the court deemed proper.[5] The result of the interference of the chancellors was to completely change the relation of the mortgagor and mortgagee to the propety. At law the mortgagee had a defeasible estate. In equity the mortgagor was considered the owner of the land. The inconvenience of this new theory became apparent as soon as the mortgagee endeavored to avail himself of his right of foreclosure. The proceeding to foreclose might be indefinitely protracted. A case is recorded in which two trials and four references were had, and which consumed ten years.[6] The ingenuity of the conveyancers addressed itself to the removal of this intolerable burden. Various restrictive clauses were inserted in the instrument of mortgage, cutting off or limiting the equity of redemption, but the courts, with great unanimity, refused to give them validity. "For were any such restrictions suffered to prevail, they would put it in the power of ev-

[1] 1 Powell on Morts., sec. 6.
[2] 2 Coke, sec. 2.
[3] 1 Powell on Morts., sec. 7.
[4] 1 Powell on Mort., secs. 7—116.
[5] 2 Broom. & Had. Com., sec. 303.
[6] 1 Powell on Mort., sec. 9*a*, n. 12.

ery mortgagee to take advantage of the necessities of the mortgagor, by inserting clauses to prevent a redemption of the estate pledged. In equity, therefore, the right of redemption is considered as inseparably incident to every contract of mortgage, as the power of a tenant in fee simple to alien."[7] *Modus et conventio vincunt non equitas.* "Once a mortgage, always a mortgage," became a maxim.[8]

Such was the condition of the law of mortgages at the beginning of the Eighteenth Century. Nothing could have been more unsatisfactory. Men having land were unable to borrow money on it, save at usurious rates of interest, and lenders, even then, were not eager to risk their property on such a form of security. About this time recourse was had to the power of sale which, in civil law, is an incident to every mortgage of property.

3. *Powers of Sale* enabled a mortgagee to accomplish in his own person, and by his own act, the result of the tedious and expensive foreclosure proceeding. Moreover they were free from many of the objections urged by the courts against stipulations affecting the equity of redemption. A power of sale did not operate as a forfeiture. It could hardly be called restriction on the equity of redemption. It was rather a new remedy for enforcing the lien of the mortgage, subject to such regulation as the parties might see fit to provide. It secured to the mortgagor the difference between the value of the land and the amount of the debt. It avoided the expense of a foreclosure, while securing to the mortgagor all the advantage which the delay of that proceeding afforded. In fine, it was as beneficial to the mortgagor as the old devices touching his right of redemption had been prejudicial. But notwithstanding the obvious utility of a power of sale, the courts for a long time refused to recognize its validity.

In 1729, Croft v. Powell,[9] decided that land might be redeemed, after a sale under a power. In 1774, the legislature of New York found it necessary to pass a law giving validity to such a power, "in view of the doubt attaching to the subject."[10] In 1825, Lord Eldon, in the "exuberance of his dubitations," perhaps, pronounced a sale under a power to be of doubtful validity.[11] In 1826, the Supreme Court of Massachusetts declared a power of sale mortgage to be a rare form of conveyance.[12] In Missouri, so late as 1839, the validity of a power of sale was seriously questioned,[13] and in Virginia it has never been recognized.[14] The objections made to such a power were, that it was another device[15] of the unscrupulous mortgagee to take advantage of the necessities of the mortgagor; that it was susceptible of abuse, as a sale might be forced at an unfavorable time; that it made a mortgagee trustee of the equity of redemption, and that it was in conflict with the jurisdiction of the courts of equity.[16] When, therefore, powers of sale had prevailed by reason of the inconveniences which they obviated, they were regarded by the courts with scanty favor, and were rather tolerated than approved. As a result of the jealousy of the courts, we have a consistent and uniform system of decisions, interpreting these powers and defining their scope. It has everywhere been held, that they are subject to such limitations as the parties may see fit to provide; that they are to be strictly construed and literally complied with, and that they are not exclusive of the other remedies of the mortgagee.[17]

A mortgagee, therefore, who has a power of sale, has two remedies by which he may enforce his lien: one, a private remedy growing out of a contract; the other, an equitable

7 Ibid., sec. 116*a*.
8 Newcomb v. Bonham, 1 Vern. 7.
9 Croft v. Powell, 2 Com. Rep. 603.
10 Acts New York, March 19, 1774.
11 Robarts v. Boson, Chan. Feb., 1825, MS.; 1 Powell on Mort., sec 9*a*, note.
12 Eaton v. Whiting, 3 Pick. 484.
13 Carson v. Blakey, 6 Mo. 273.
14 Taylor v. Chowning, 3 Leigh. 654.
15 Byron v. May, 2 Chand. 109.
16 Coventry's note, 1 Powell on Mort., sec. 9*a*; Kornegay v. Spicer, 76 N. C. 95; Wofford v. Board of Police, 44 Miss. 579.
17 *Ex parte* Davis, 3 Deac. & Ch. 504; 2 Am. Law Reg. 653-717; 2 Broom. & Had. Com., sec. 307; Jones on Mort., sec. 1773; Sullivan v. Hadley, 16 Ark. 129; McGowan v. Branch Bk. of Mobile, 7 Ala. 828; Marriott v. Givens, 8 Ala. 694; Carradine v. O'Connor, 21 Ala. 573; Byron v. May, 2 Chand. 105; Wilson v. Troup, 2 Cowan 195; Shaw v. Norfolk R. Co., 5 Gray, 169-180; Bennett v. Union Bank, 5 Humph. 612; Dutton v. Cotton, 10 Iowa, 408; Osgood v. Franklin, 2 Johns. Ch. 25; Thompson v. Houze, 48 Miss. 444; Butler v. Ladue, 12 Mich. 180; State Bank of Bay City v. Chapelle, 40 Mich. 447; Kornegay v. Spicer, 76 N. C. 95; Bradley v. W. C. R. Co., 36 Penna. 150; Morrison v. Bean, 15 Texas, 267; Blackwell v. Barnett, 52 Texas, 326; Walton v. Cody, 1 Wis. 420; Thornton v. Pigg, 24 Mo. 249; Johnson v Houston, 47 Mo. 227.

remedy by foreclosure. He may pursue either or both. The purpose of this article was to determine whether or not, in making his election, he is to regard the limitations of the power as attaching to the concurrent remedy by foreclosure. For example, presume a mortgage containing a power to sell one year after default. May the mortgagee foreclose before the twelve months have expired?

As stated, a power of sale was resorted to, to relieve the mortgagee from the burden of foreclosure. It is a privilege granted by the mortgagor, and as such may be restricted in any manner desired. But it is not exclusive of the remedy by foreclosure. It is an additional remedy. A mortgagee may not purchase at a sale made by himself. The limitations upon the power were sometimes so inconvenient as to preclude the exercise of it.[18] In some States, statutes have been passed, allowing redemption of the estate within a certain time after sale.[19] Foreclosure is in many cases the safest course to pursue where there is doubt or difficulty, or the rights of many parties are concerned.[20] These two remedies were therefore declared to be concurrent, distinct and independent. One is regarded as a right, the other as a privilege. One is the creature of law, the other grows out of the contract of the parties. No reason is perceived why a restriction on the privilege should affect the right, particularly when one of the reasons for retaining the right, was to avoid the inconvenience of such restrictions. Moreover, the purpose of the restriction as to time, now under consideration, is sufficiently effected by the delay incident to the foreclosure proceeding. It is hard to understand otherwise, why a mortgagee should desire a remedy which would be less speedy in its operation than the right which is incident to the contract. Such a limitation on the power could hardly have been intended by the parties to attach to the concurrent remedy.

Good reason has been shown why the courts should refuse to extend the scope of such restrictions. Many of them are, as a matter of course, disregarded. Such as the provisions of the power relating to the place of sale, the kind of notice, etc. All proper precautions are secured by the rules or orders of court, and its process may not be controlled by the stipulations of the parties, even where the intent to control it is unequivocally expressed.[21]

Discussion of this matter is important in view of the mistake which is occasionally made when lawyers, desiring to limit the right of resorting to the mortgaged property, insert the limitation in the power of sale, rather than in the condition of the mortgage. The right to foreclose being incident to foreclosure, or breach of condition, unless it be expressly attached to some other event, arises immediately thereafter; whereas, the right to sell never arises by implication on any event whatever. Both the power and the occasion of sale are matters of agreement. The only safe way, therefore, to restrict the right of foreclosure to an event, is to make the event the condition of the deed, or by express and unequivocal words to restrict the right to the event. A restriction on the power of sale will not have this effect. Such was the decision of the court in the Michigan case of Butler v. Ladue.[22]

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[18] Sullivan v. Hadley, 16 Ark. 129; Dutton v. Cotton, 10 Iowa, 408.
[19] 1 Rev. Stat. Mo. 1879, sec. 3298.
[20] 4 Kent, 190.
[21] Chase v. McLellan, 49 Me. 375; Quartermons v. Kennedy, 29 Ark. 544.
[22] 12 Mich. 180.

CORPORATION—NATIONAL BANK TRANSFER OF STOCK—ATTACHMENT.

SCOTT v. PEQUONNOCK NAT. BANK OF BRIDGEPORT.

United States Circuit Court, Southern District of New York, January 15, 1883.

Where a national banking association has made no by-laws on the subject of transfer of its stock, the unrecorded transfer of such stock has precedence over the rights of an attaching creditor.

Geo. F. Canfield, for plaintiff; *L. B. Bunnell*, for defendant.

SHIPMAN, J., delivered the opinion of the court:

This is an action at law to recover damages from the defendant corporation for a refusal to allow a transfer upon its books to the plaintiffs of ten shares of its stock. By written stipulations of the parties the case was tried by the court upon the hereto prefixed agreed statement of facts, and a jury was waived. Said facts are also found to be true.

In the absence of a statute or of a provision in the charter or of a by-law prepared in pursuance of authority conferred by the charter prescribing

the exclusive manner in which the stock of a corporation shall be transferred, the stock owner has a right to transfer such property to a purchaser by the delivery of the stock certificate with a written assignment thereof.

The title of a *bona fide* purchaser, to whom such certificate and assignment have been delivered, will not be divested by the subsequent attachment of the stock at the suit of a creditor of the vendor. Boston Music Hall v. Corey, 129 Mass. 435-7.

In some of the States, statutes have been passed or provisions have been inserted in the charter of corporations prescribing, either expressly or by implication, an exclusive method of transfer. The courts of Connecticut and of Massachusetts have been quite rigid in maintaining the doctrine that where such statutes or charter provisions exist, an unrecorded transfer of stock shall not be valid as against attaching creditors of the vendor, and the courts of the former State have strongly leaned towards a construction of the charter of Connecticut corporations, which shall compel a record of the assignment.

The Connecticut decisions, especially the earlier ones, which were made at a time when the rights of attaching creditors were strongly favored in that State, were to the effect that "in cases where the legislature, in the act of incorporation, either prescribes the mode of transferring stock or authorizes the company to do it in their by-laws, prescribe a mode as the only one to be pursued, that mode must be followed or the legal title will not pass by an assignment which would be good at common law had no particular and exclusive mode of transfer been prescribed." Colt v. Ives, 31 Conn. 25.

The reason of the rule is stated by the court in Colt v. Ives, as follows: "In regard to chattels, there must be a substantial change of possession accompanying and following the sale, or it will, unexplained, be conclusive evidence of a fraudulent trust, which will render the sale void as to creditors. * * * * And in the case of the purchase of stock in a corporation there must be such a transfer of it as the legislature in the charter or by statutes prescribes, and notice of the assignment of choses in action and the transfer required by statute of corporate stock stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the property admits."

In Fisher v. Essex Bank, 5 Gray, 375, Chief Justice Shaw, after saying that whatever common law rules, in the absence of any express rule of law, courts have adopted to determine what act constitutes the actual transfer of shares, when the transfer is so regulated, such law must govern, held that an express provision in the act of incorporation of a bank that the stock should be transferable only at its banking house, and on its books made a transfer at the bank imperative as against an attaching creditor without notice of the previous assignment and delivery of the certificate to a purchaser, Judge Shaw's reasoning was to the effect "that it is necessary to fix some act and some point of time at which the property changes and vests in the vendee," and that by the charter the transfer at the bank is made "the decisive act of passing the property, the legal transferable attachable interest."

The defendant claims the benefit of this series of decisions in the present case, and especially insists that as the defendant corporation is located in Connecticut, the decisions of the courts of that State should have the controlling effect. The defendant having been incorporated under the National Banking Act, the rules which regulate the transfer of its stocks are to be found in the statute of the United States. The twelfth section of the act of 1864 (13 Stat. at Large, 102), provided that the shares of the stock of a national bank shall be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." In the eighth section of the same act the directors are empowered "to define and regulate by by-laws, not inconsistent with the peovisions of this act, the manner in which its stock shall be transferred." These provisions are contained in substantially the same terms in secs. 5139 and 5136 of the Revised Statutes.

The construction of the statute and the question of title as between the assignee and the attaching creditor are not controlled by the terms of the decisions of any one State. The construction which has been more generally placed upon these provisions in charters which require that the transfer shall be made only upon the books of the corporation, or upon provisions of a similar character, is that this regulation is designed for the security of the bank and of *bona fide* purchasers who take transfers of the stock and possession of the certificate without notice of any prior equitable transfer, and that as between the parties to the sale a transfer not in conformity to such provisions passes the equitable though not the legal title, and vests the right to shares in the purchaser. Black v. Zabriskie, 3 How. 483; United States v. Cutter, 1 Sumn. 133; New York, etc. R. Co. v. Schuyler, 34 N. Y. 80; McNeil v. Tenth Nat. Bank, 46 N. Y. 325. The New York decisions are to the effect that such a transfer conveys the legal title.

In Johns v. Laflin, 103 U. S. 800, a case involving the transfer of shares in a national banking association, which, like the defendant, had made no by-laws on the subject of transfer of its stock, the court say: "Shares in the capital stock of associations under national banking law are salable and transferable at the will of the owner. They are in this respect like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. * * * * It is not necessary, however, to consider what restrictions would be within its (the bank's) power, for it had imposed none, as between Laflin and the broker the transaction was consummated when the certificate was delivered to the latter

with the blank power of attorney indorsed, and the money was received from him. As between them the title to the shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank where the stock is sold is required not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders entitled to vote at their meeting and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and, perhaps, also to protect the purchaser against proceedings of the seller's creditors.

From the recent decision of the United States Supreme Court it appears that no exclusive method of transfer of stock in a national banking association is imposed by the provisions of the National Banking Act in regard to transfers, where no by-laws on the subject have been prepared by the bank where the stock is in controversy, and that an unrecorded transfer is good as between the parties; and that the question of the rights of an attaching creditor of the seller of stock transferred by an unrecorded assignment was regarded by the learned judge who wrote the opinion as one not definitely settled.

In holding that the unrecorded transfer has precedence over the attachment, I am influenced by the following considerations: First. In absence of positive provisions of law or rules of evidence, either statutory or by decisions of courts, whereby transfers of property made without notice to the public or without registry are declared fraudulent or void as against attaching creditors without notice, or whereby certain specified acts are made prerequisite to the vesting of a new title, creditors take their debtor's property, subject to all honest and *bona fide* liens and equitable transfers. Boston Music Hall v. Corey, 129 Mass, 435; Continental National Bank v. Eliott Nat. Bank, 7 Fed. Rep. 369. In this case there is no statutory provision and no by-law which requires that a transfer of the stock must be recorded, and, in the absence of such provision, the non-recording of the transfer is not evidential of fraud, as is the case where the vendor retains possession of chattels after a sale. The delivery of the certificate and the assignment and the power to transfer is a sufficient delivery at common law.

The statutes of Connecticut, in regard to the attachment of stock and the levy of execution thereon, do not give to the attaching creditor any peculiar rights in stocks which have been transferred by an unrecorded transfer. The extent of the rights which the attaching creditors would have in such stock of a Connecticut corporation is to be determined by other statutes than those which relate to attachment and levy of execution. Boston Music Hall v. Corey, 129 Mass, 435.

Second. The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment and power to transfer as approximating to negotiable securities, though neither in form or character negotiable. Bank v. Lanier, 11 Wall. 369; Railroad Co. v. Bridgeport Bank, 30 Conn. 270.

Third. The courts of these States which have most strongly upheld the superior rights of attaching creditors of the vendor as against the unrecorded equities of purchasers regard the attaching creditor with less favor than formerly "when attachment and sales on execution were the only compulsory mode of securing an appropriation of a debtor's property to the payment of his debts." Colt v. Ives, 31 Conn. 25.

Fourth. Decisions of high authority in the Federal courts have given unrecorded transfers of stock for value precedence over subsequent attachments in behalf of creditors of the vendor or over the claims of creditors. United States v. Cutter, 1 Sumn. 133, approving United States v. Vaughan, 3 Ben. 394; Continental National Bank v. Eliot National Bank, by Lowell, J., 7 Fed. Rep. 369.

In the agreed statement of facts it is agreed that if the plaintiffs are entitled to judgment, the amount of damages is the sum of $1,030, plus the lawful interest on the same from August 13, 1869, to October 23, 1882. In an action of tort to recover unliquidated damages if interest as a part of the damages is to be added to the principal sum found to be due the rate of interest it now in this State six per cent. Salter v. Railroad Co., 86 N. Y. 401.

Let judgment be entered for the plaintiffs in the sum of $1,845.41, and costs of suit.

RAILROADS — CONSOLIDATION — OUTSTANDING INDEBTEDNESS.

TYSEN v. WABASH, ETC. R. CO.

United States Circuit Court, District of Indiana.

1. In the consolidation of railroad companies, the consolidated company is substituted for the constituent companies, and the unsecured indebtedness of the latter remains unsecured indebtedness of the former.

2. But where one of the stipulations of the consolidation agreement is the payment and "protection" of certain unsecured bonds of one of the constituent companies, this will constitute such bonds a lien upon the property of that constituent company which passes into the hands of such consolidated company.

In 1862, the Toledo & Wabash Railway Co. of Ohio and Indiana made an issue of bonds to the amount of $600,00, with interest, payable semi-annually at 7 per cent, and principal payable May 1, 1883. Each bond bore upon its face the name "Equipment Bond," although they were not especially secured upon any equipment of the company. At the time of their issue the company

was liable for bonds to the amonnt of $5,900.000, secured by mortgages, In 1865, the Toledo & Wabash Railway Co. became consolidated with other companies in Illinois, and the Toledo, Wabash & Western Railway Co. was formed. In the articles of consolidation one of the "bases and conditions" thereof was stated to be, as to all bonds, that they "shall, as to the principal and interest thereon, as the same shall respectively fall due, be protected" by the new company. The equipment bonds were included in the indebtedness of the Toledo & Wabash Co., which the new company was to "protect" and pay. On the first day of February, 1867, the Toledo, Wabash & Western Co. executed its bonds amounting to $15,000,000, and a trust deed upon all its property to secure them. This was done to fund the company's indebtedness, which, including the equipment bonds, amounted to $13,300,000, and to raise $1,700,000 to purchase additional equipment.

In this mortgage it was recited "that of the amount of said bonds so raised and issued there should be retained $13,300,000, to retire in such manner and upon such terms as the directors of such company may from time to time prescribe, a like amount of the bonds of the various companies herein above enumerated and described, and representing the aforesaid funded debt." The equipment bonds appeared in the list of bonds described in the mortgage, which were to be taken up by the new issue. After a small part of the old bonds had been exchanged for new ones, this funding scheme seems to have been abandoned,

In 1873, the Toledo, Wabash & Western Railway executed a mortgage for $5.000,000, and in 1875 proceedings were instituted to foreclose under it, and a sale took place June, 1876, of all the property in Ohio, Indiana and Illinois, "without prejudice to any claim that may be made by the holders of the bonds called the equipment bonds."

Interest on the equipment bonds was regularly paid up and including that due November 1, 1874. But the purchasers at the sale of 1876, and their successor company, the Wabash Railway Company having declined and refused to pay further interest, or in any way to recognize these bonds, this suit was begun in 1878 in the Fountain circuit court of Indiana. It was immediately removed by the railway company to the United States Circuit Court. The Wabash Railway Co. having since been consolidated with the St. Louis, etc. R. Co., the consolidated company, the Wabash, St. Louis & Pacific Railway Co., was joined as defendant in possession.

Charles W. Hassler, counsel for plaintiff; *Wager Swayne*; *Baker, Hord & Hendricks*, counsel for respondent.

GRESHAM, J., delivered the opinion of the court:

No lien of any kind existed in favor of the holders of the equipment bonds prior to the consolidation in 1865. It can not be disputed that before this consolidation, which was authorized by law and untainted by fraud, the Toledo and Wabash Company might have executed a mortgage upon all its property, which would have been paramount to all its unsecured indebtedness, including the equipment bonds. The statute authorizing the consolidation of railroads and their possessions was in force when the equipment bonds were issued and sold, and it became a part of the contract between the Toledo and Wabash Company and the purchasers of those bonds. The purchasers must therefore be held to have contemplated, at the time they bought their bonds, that the Toledo & Wabash Company could, and possibly would, consolidate with other railroad companies. The result of a consolidation under the statute is, that the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. That being so, it follows that the consolidated company may execute a mortgage upon all the consolidated property, which will be paramount to the unsecured indebtedness of the constituent companies. McMann v. Morrison, 16 Ind. 172; Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465; Jeffersonville, etc. R. Co. v. Hendricks, 41 Ind. 50; Paine v. Lake Erie, etc. R. Co., 30 Ind. 283.

Was there anything in the terms of the consolidation of 1865 that gave to the holders of the equipment bonds a security of lien which they had not before? Did the consolidated company take the property and franchises of the Toledo & Wabash Company with an incumbrance which did not rest upon them before?

It was competent for the constituent companies to agree upon their own terms of consolidation, provided they were not in violation of the statute authorizing consolidation. The property and rights of the Toledo & Wabash Company, at the time of the consolidation, were estimated to be worth $10,000,000. Part of the consideration for the transfer of this property to the consolidated company was the payment of the $600,000 of equipment bonds. The consolidation agreement contains the following: "It is further agreed that the bonds and other debts herein above specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereon, as the same shall respectively fall due, be protected by the consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The equipment bonds are embraced in the schedule of bonds and debts referred to in this clause. The agreement to pay these bonds as part of the purchase price of the property put into the consolidation by the Toledo & Wabash Company, was made for the benefit of the equipment bondholders, who thus acquired an equitable lien on such property. This lien is good against all persons except subsequent purchasers, without notice.

When the consideration for conveyance of property is the payment by the vendee of the debt of

a third person, a lien exists upon the property conveyed for the benefit of such third person. Nichols v. Groves, 41 Ind. 24; Story's Eq. 1244; Clyde v. Simpson, 4 Ohio St. 445; Vanetter v. Vanetter, 3 Gratt. 148; Harris v. Fly, 7 Paige, 421; Hallett v. Hallett, 2 Paige, 15.

It was no doubt the intention of the legislature, in passing the statute authorizing the consolidation of railroad companies, that the consolidated company should be substituted for the constituent companies, and that the unsecured indebtedness of the latter should remain unsecured indebtedness of the former. While this is the result of a consolidation under the statute, as already stated, the consolidation may be on such terms as suit the contracting parties, provided these terms do not violate the statute. One of the stipulations of the consolidation agreement was payment by the consolidated company of the equipment bonds. The language of this part of the agreement, considered in connection with the terms and recitals of the consolidated mortgage, the consolidation agreement of 1868, the deed of further assurance and the prompt payment of interest on the eqnipment bonds, semi-annually, as it became due, for eight years after 1865, shows that something more was intended than the mere assumption of an unsecured indebtedness. The proceeds of the equipment bonds had been expended in the betterment of the property of the Toledo & Wabash Company; that company was to pass out of existence, and its entire property was to become part of the possessione of the consolidated company. For this reason it may have been thought just to the owners of the equipment bonds that they should have security in the nature of a lien on the property superior to any rights that may thereafter be acquired. We may assume that it was well understood by all the parties to the consolidation agreement of 1865 that the consolidated company, by the mere force of the statute which authorized its creation, was bound to pay all the debts of the constituent companies. No one understands that better than the counsel who drew up the consolidated agreement. If nothing more was contemplated by the clause quoted from this agreement than a promise to pay the equipment bonds as unsecured indebtedness, why was the word "protect" used? If the counsel of the defendants are correct in their interpretation of that word, its use was wholly unnecessary. Whenever it fairly appears from an instrument, notwithstanding its form, that it is intended to afford a security, an equitable lien exists in favor of the person for whose behalf the provision is made. Jones on Mortg., 162.

The Wabash, St. Louis and Pacific Company now owns and operates the property which the Toledo, Wabash and Western Company acquired from the Toledo and Wabash Company, and denies its liability on the equipment bonds. There is nothing to prevent the holders of these bonds from asserting against the present owners of this property the equitable lien which they were entitled to under the consolidation agreement of 1865. All subsequent interests have been acquired with knowledge of this agreement.

These are briefly my reasons for holding that the equipment bonds are a charge upon the property now owned by the Wabash, St. Louis and Pacific Company, which originally belonged to the Toledo and Wabash Company.

A decree will be entered declaring such a charge and for accrued interest.

The case would have been decided at an earlier day but for a statement made by the complainant's counsel, that the matter in dispute might be amicably adjusted.

EVIDENCE — PRIVILEGE—TESTIMONY OF PHYSICIAN.

GARTSIDE v. CONNECTICUT MUTUAL LIFE INS. CO.

Supreme Court of Missouri, February 26, 1883.

A physician or surgeon, testifying in a case, is not permitted to disclose any information he may have acquired while attending the patient, and necessary for him to prescribe or to act professionally in the case, whether acquired verbally, by observation or otherwise.

NORTON, J., delivered the opinion of the court:

This suit was instituted in the circuit court of the City of St. Louis on a policy of insurance to recover a death loss. On the trial judgment was rendered for defendant, which, on plaintiff's appeal to the St. Louis Court of Appeals, was reversed, and from this judgment of reversal defendant presents an appeal to this court.

The only question presented on said appeal for our determination is, whether a physician, who is called to visit a patient, when introduced as a witness, can be required or allowed to disclose any information acquired by him from such patient, either orally, by signs, or by observations, of the patient after he has submitted himself for examination, which information was necessary to enable him to prescribe for such patient.

An affirmative answer reverses, and a negative affirms, the judgment, and the solution of the question is dependent upon a construction of the fifth subdivision of sec. 4017, Rev. Stat., which declares that "the following persons shall be incompetent to testify, viz., a physician or surgeon concerning any information acquired by him from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."

It is contended, on the one hand, that the above statute was only designed and intended to forbid the disclosure of such information only as a physician, while attending a patient, acquired orally from the patient. It is contended, on the other

hand, that the statute forbids not only information acquired through the ear by oral communication, but also all information acquired through the eye by observation or examination of the patient after he has submitted himself to the care of the physician for examination and treatment. In settling this contention and obtaining the proper construction to be placed on said sec. 4017, we feel authorized to look at adjudications in other States having similar statutes. A kindred statute has been in existence in New York since 1828, and is as follows, viz.: "No person authorized to practice physic and surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."

This statute has been repeatedly before the courts of that State for construction, and in a long line of decisions, beginning in 1834 and extending down to 1880, it has been held that the object of the statute was to impress secrecy upon the knowledge acquired by a physician in the sick chamber, whether acquired by conversation had with the patient, or was the result of observation or examination of such patient, and which information was necessary to enable him to prescribe for the patient. Johnson v. Johnson, 4 Paige, 460; Hanford v. Hanford, 4 Edw. Ch. 468; People v. Stout, 3 Parker Cr. R. 670; 45 N. Y. 125; 5 How. 1; Edgington v. Mutual Life Insurance Co., 13 How. 543; Gratton v. Mutual Life Ins. Co., 24 How. 43. In Michigan the statute upon this subject is in the exact words of the New York statute, and the same construction has been put upon it by the courts of that State. Judge Cooley, who delivered the opinion in the case of Briggs v. Briggs, 20 Mich. 34, observing: "Nor do I think the physician's evidence admissible. He had no knowledge upon the subject except what he obtained in the course of his professional employment, and the case appears to be directly within the statute. We do not understand the information here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting with the veil of privilege, whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose." It is plausibly argued by counsel that inasmuch as the statute differs from the New York and Michigan statute in this—that the words "from the patient," inserted in the statute after the word acquired, are not to be found in the New York statute, and that therefore the observations above referred to are not authoritative.

While it is true that the phraseology of our statute is different in the above respect from the New York statute, it is also true that the object intended to be accomplished by both is the same, and the meaning of both is the same when construed with reference to the object intended to be brought about, *viz.*, "casting the veil of privilege or secrecy over information acquired by a physician while professionally engaged in the sick chamber and necessary to enable him to prescribe.

Information acquired by a physician from inspection, examination or observation of the person of the patient after he has submitted himself to such examination, may as appropriately be said to be acquired from the patient as if the same information had been orally communicated by the patient.

The construction contended for by defendant's counsel, that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient, would, in our opinion, nullify the law to hold that while under the statute a physician would be forbidden from disclosing a statement made by a patient that was suffering from syphilis, and to allow him to state as the result of his observation and examination of the patient that he was diseased with the syphilis, would be to make the statute inconsistent with itself.

It is doubtless true that physicians learn more from their own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of the physician is sealed up as to information acquired orally from his patient, and opened wide as to information acquired from a source upon which he must rely, *viz.*, his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the legislature, and virtually to overthrow it. It follows from what has been said, that the circuit court erred in permitting Drs. Gregory and Bauduy, two physicians, to give in evidence the information acquired by them while attending Gartside, their patient, professionally, although such information was acquired, not by what the patient communicated, but from observation and examination. The same error was committed in reference to the admission of the evidence of Dr. Hodgen, except as to information acquired by him from observing Gartside on the street anterior to his employment as a physician.

The judgment of the St. Louis Court of Appeals, reversing the judgment of the Circuit Court, and remanding the cause, is affirmed, with concurrence of all.

APPEAL—ERROR—MANNER OF JUDGE IN CHARGING JURY.

HORTON v. CHEVINGTON & BUNN COAL CO.

Supreme Court of Pennsylvania.

The manner of a judge in delivering a charge, even if reprehensible and deserving of condemnation, can not be reached for correction in the court of review by the ordinary method of assignment of error.]

Error to the Court of Common Pleas of Bedford County.

Messrs. John Cessna, John H. Jordan and *R. M. Speer*, for plaintiff in error; for defendant in error, *Messrs. Russell & Longnecker, J. S. Black, T. M. Reynolds* and *Samuel S. Blair*.

GREEN, J., delivered the opinion of the court.

The assignments of error in this case all relate to the charge of the court. There are none to the admission or rejection of testimony, or to answers to points. In the main the complaints are rather to the manner and character of the utterances of the judge in his charge, than to erroneous statements of the law. Without doubt some portions of the charge are fairly subject to criticism, and in several instances language used might well have been omitted or modified. After a patient examination, however, of the several assignments, we have reached the conclusion that none of them are sustained by considerations sufficient to justify a reversal and the judgment will therefore be affirmed. We will dispose of the assignments in the same order as they are presented in the paper-book:

First assignment.—The plaintiff gave in evidence the proceedings of the Board of Property, showing the rejection of the return of survey of the ten acre warrant, and the refusal to issue a warrant on the two hundred acre application. The learned judge, speaking of these proceedings, and of the point raised by the defendant, which was refused, remarked that the decision of the board was competent evidence, but was not conclusive. No effect upon any right of the plaintiff was given to the proceedings of the board by this remark. The full right of recovery was allowed just as if those proceedings had not taken place. In the very next sentence the court told the jury that the plaintiff had a right to bring suit within six months, and have his claim tried by a court and jury. The proceedings having been given in evidence by the plaintiff himself, it was certainly not error for the court to say they were competent evidence though not conclusive.

Second assignment.—This assignment is scarcely pressed, and certainly has no merit. The judge merely stated an allegation that the shifting of the location in accordance with the plaintiff's theory, would leave valuable land vacant and subject to be taken up at a very low price. As this would be true in fact we can not say it was error.

Third, fourth and eighteenth assignments.—The statement by the judge of the law as to the duty of the surveyor to go upon the ground and mark his survey, and of the legal presumption that he had done this, was certainly correct. It is equally correct to say that no mere assumption or guess of a surveyor is sufficient to set aside the presumption. The remark was general and was harmless if there were no assumptions or guesses in the plaintiff's testimony; but if there were it was entirely appropriate. It was not in the best taste to refer to William Piper, the original surveyor, as having been a member of Congress and of the Pennsylvania Senate, since those positions would add nothing to his qualities as a surveyor, but it is surely not error to refer, in speaking of a witness, to the fact that he has held certain offices. The court also said in the same sentence that William Piper had also held, for several years, the office of deputy surveyor, which was more to the point. What was said by the judge as to the insufficiency of theories, assumptions and guesses, to destroy the effect of a survey, and to prove mistakes in it was entirely correct in the abstract. We can not say there was no necessity for such remarks from the court. It was undoubtedly true that an effort was made by the plaintiff to establish mistakes in the location of the Bunn warrant, by the use of certain theories and suppositions advanced by his surveyors. If these were not well founded, or if facts in the case sustained by testimony and legal presumptions were in conflict with them, the remarks of the judge were appropriate and were demanded by the occasion. If the opinions, theories or assumptions of the surveyors, were well founded, their value depended upon the facts on which they were based, and it was proper for the court to say so. The judge did not say that the plaintiff's testimony consisted of "suppositions, assumptions and guesses," but that so much of it as was of that character was insufficient to destroy the return of survey, unless supported by facts. It was the undoubted fact that Piper's return of survey to the Bunn warrant did call for the Bollman on the north, and by the same course and same distance as the southern line of the Bollman, and it was also the fact that Piper made both surveys, and at very nearly the same time. This condition of these two surveys was absolutely fatal to the plaintiff's case, since his claim was for land lying between these two lines, and required them to be a wide distance apart. Surely, if such a location as was indicated by the returns of the Bollman and the Bunn was to be defeated by opinions and theories, whether in whole or in part, it was essential that those opinions and theories should be supported by facts, and by facts clearly established. We think this is the fair construction of all that the court said in this connection. What was said about the effect of surveyors' opinions generally must be taken as relating to the same subject-matter, and not as a declaration that the opinion of a surveyor is of no value, even as to matters of opinion only, except when based upon facts actually proved to exist.

All this is true of the sixth assignment, which is of kindred character. What was said about the number of witnesses and the weight to be attached to or withheld from their testimony, is entirely correct. The remarks in question were not made about any particular part of the case. On the contrary, they were general in their character, and were in immediate connection with, and a part of, general suggestions to the jury respecting the importance and complicated character of the case, and the nature of the duties devolving

upon them. These latter constitute the substance of the fifth assignment, which certainly is without merit. The court made no reflection upon counsel on either side. The remark in relation to counsel refers to those on both sides, and was in no degree derogatory to either.

Although the seventh assignment is pressed with earnestness, we see no substantial merit in it. It consists of three sentences of the charge, the correctness of the first of which is not even questioned. In the second the court used the word "dare," when, perhaps, "should" or "may" would have been more suitable, and alluded to the fact that some of the surveyors seemed to have assumed that Piper had neglected his duty or made mistakes. In the third sentence the judge said that Piper probably knew more about surveying than some of the witnesses who had ventured opinions. While this remark may have been entirely correct in fact, we think it was uncalled for and inappropriate. But that does not make it error. It was at best the expression of a probability, the plaintiff's witnesses were not named or necessarily referred to, and the subject was not material. It can not fairly be regarded as an attack upon the plaintiff's witnesses, as is contended in the argument.

Eighth and ninth assignments.— The judge in a considerable portion of the charge immediately preceding the parts complained of in these assignments had pointed out certain material discrepancies between the survey of the Bunn as located by the plaintiff, and the return of survey made by Piper. No exception is taken to this part of the charge, and an examination of the testimony proves it to be a correct presentation of the matter therein developed. This being so, it seems to us very natural and appropriate for the judge to present the suggestions and inquiries contained in the portions assigned for error. We have not been able to discover any satisfactory answers to them and the learned counsel for the plaintiff do not indicate any. We think they overestimate the language of the court as being an attack upon their witnesses, or as being charged with feeling or heat.

Tenth assignment.—The learned judge had just said that both sides claimed that the call for "surveyed land" on the west side was filled by their respective locations, one by the Sipes and the other by the Chevington, and that the Chevington was considered a lost survey. Of course if the Chevington was an obscure or lost or uncertain survey, it would be natural that Piper, eleven years afterward, in surveying the Bunn, should simply call for it as "surveyed land." The same would be true of the Sipes' survey if it was of the same character, but there was no allegation that it was. On the contrary, it appears to have been a well known survey without question as to its lines. The judge did not say there was any evidence that Piper had ever seen the draft of the Sipes' survey, or knew the survey by that name, but he did say that if Piper knew it and intended to adjoin it, he would naturally have named it as an adjoiner, and that it would be singular if he did not. This is all true, and the court might well have completed the inferential process by adding that if the Sipes' survey was unknown to Piper, he would, in that event, also have called for it as "surveyed land." It probably did not occur to the judge to present this additional hypothesis, simply because the well known and well marked character of the Sipes' survey seems to have been taken for granted throughout the trial. Full fairness would have been subserved by the addition we have suggested, but we can not say its omission was error.

Eleventh assignment. — We think the learned counsel for the plaintiff have placed a more extreme construction upon the language of the charge here complained of, than was intended by the court, or than can be fairly inferred from the words used and the context. We do not understand the court as saying that it was not possible in any circumstances to detach the Bollman from the Bunn, because both surveys called for the lane improvement. The judge was evidently meeting and answering the argument that the Bunn adjoined the lane because the Bunn survey called for the lane, by the reply that the same reason would carry the Bollman also to the lane, since that survey called for the lane on a mere continuation of the same line which on the Bunn survey called for it. A mere inspection of the two returns of survey proves this to be entirely correct, and we are quite clear that this is the true interpretation of the language of the charge. The question was, what was Piper's meaning in calling for the lane on the Bunn survey? If he certainly and absolutely meant that the lane did adjoin the Bunn on the line 55 E. as indicated on the draft, then he did just as certainly and absolutely mean that the same lane adjoined the Bollman on *its* line N. 55 E., as the latter was a mere continuation of the former. The next two succeeding sentences of the charge clearly prove this to have been the meaning of the judge, and these are not assigned for error. The language covered by the twelfth assignment demonstrates that the court did not say or mean to say, that the Bunn could not possibly be shifted without also shifting the Bollman, because that very question is there presented. Thus, the learned judge says: "If, then, the call for the Bollman is the stronger and governing call, the next question is, is it controlled by definite and clearly-marked lines on the ground which will carry the survey away from the Bollman and abut it on the lane?" He then adds, that if the jury can not give the survey all its calls, and if the call for surveyed land on the west is better filled by the Chevington than the Sipes, "then there remains the question whether the plaintiff has found marks which must control the return of survey, govern the case, and draw this tract over to the lane and away from the Bollman." There is not only not error in this but it is conclusive proof that the portion of the

charge covered by the eleventh assignment is not properly subject to the criticism made upon it.

Thirteenth assignment.—The judge did not say that the chestnut block counted seventy-five growths, or give any direction to the jury that they should so regard it. On the contrary, he expressly told them that there was great conflict of testimony in regard to the block, and that they could take them and count them. He added, that he had counted only one of them, and that he could count seventy-five growths on that one, and that there was no obscurity of growth in it. The block was a tangible, visible substance, and was itself given in evidence. Of course every juror was at liberty to count it, as were also all the counsel and the judge, each of whom could state the result of his own count. What the actual count was remained for the jury to determine. We can not say the judge was in error, when he said he could count seventy-five gfowths, as the block is not before us, and if he stated the facts correctly he certainly committed no error.

Fourteenth assignment.—As the oral statements and arguments of counsel on the trial are not printed, and are no part of the record, it is, of course, impossible for us to say that the court was in error in saying that it was insisted on either side that the block, in dispute as to its genuineness, should be opened. We assumed that in fact it was not opened, as no contrary allegation is now made.

Fifteenth assignment.—The testimony quoted in support of this assignment does not convict the court, in our judgment, of either suppression or perversion of evidence. None of it goes to 1806, or indicates that the improvement covered more than a quarter of an acre. As to its going beyond 1835, the assignment cuts in two the sentence of the charge on that subject, and alleges error in tne first clause, but not in the second. Now, the second clause supplies what appears to be claimed as the error of the first, to-wit, an implication that the evidence of this improvement does not go back of 1835. The part assigned as error is in these words, "the earliest evidence is in 1835." The remainder of the sentence, which is not assigned, says, "then Long, who first saw it at the time, says it was an old looking building, a story and one-half high, with a door in it, and used by a man named Snow, who was engaged in coaling," etc.

Sixteenth and twentieth assignments.—We can not say there is error in the statement, "it is by no means sure that roads and streams are not quite as important as trees." * * * * "They may be better." The relative value of these indications would depend largely upon their greater or less correspondence, in the given case, with their representations on the official survey. In the present case it must be confessed there is great difficulty in reconciling the road and stream appearing on the official survey of the Bunn, with the survey of the same tract as the plaintiff locates it. Again, trees may not be always marked, so as to speak with absolute certainty, and there is often grave question as to the identity of such as are claimed to have received the original marks. Of course an interior stream is of less importance than a boundary stream, but that consideration does not establish error in the remarks covered by these assignments.

Seventeenth assignment.—We think the concluding sentence of the language here complained of might well have been omitted. While the sentiment it contains may be a legitimate deduction from the precedent reasoning, we think it lacks the dispassionate calmness with which, as a general rule, judicial utterances should be made. The expression, "quintessence of stupidity," might have been clad in choicer phrase, but that is a matter of taste. However these things may be, the substance of this portion of the charge is within the warrant of the testimony. The judge was commenting upon the feature of the case developed by the lane improvement. This also was surveyed by William Piper, in 1809, three years after he surveyed the Bunn. His return does not call for the Bunn on the north, but for Ray's Hill. That survey certainly does seem to interfere largely with the plaintiff's location of the Bunn. The suggestion that it would make three lines, where one only would be necessary or probable, is of force, and we can not say it was overestimated by the court. The observations relative to the line of the Moyer, N. 86 W., do not require comment. It was manifestly and admittedly a mere error in writing the letter N. for the letter S.

Nineteenth assignment.—The judge did not say that the old dead pine was a corner of the Bunn. He simply said, after stating that both the chestnut and the pine were disputed, that the weight of the evidence was, if Ketterman and Sams were believed, that the "pine is an old marked corner." As these witnesses did so testify we see no error in this language of the charge. We are not referred to any testimony of the plaintiff's surveyors, and have not been able to find any contradicting the pine as an old marked corner.

We do not think the charge as a whole is amenable to the objections of the twenty-first assignment. As to the manner of the judge in delivering the charge, it is not, and can not be, before us, and hence we can not review it. If it were in truth of the character alleged, which is denied, it would certainly be reprehensible, and deserving of condemnation by a court of error. It is rarely that such complaints are made, and there ought never to be occasion for them. We are, however, powerless to afford relief for grievances of that kind, by the ordinary method of assignments of error.

Judgment affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATION — ADMINISTRATOR'S DUTY TO PAY TAXES.

The real estate of an intestate descends to his heirs, subject in certain contingencies to the payment of the debts of the intestate; but, if the administrator does not need the lands of the estate with which to pay the debts, and does not sell the same, it is not his duty to pay the taxes accumulating on the real estate subsequent to the death of the intestate. *Reading v. Weir*, S. C. Kan.

2. AGENCY—DELEGATION OF AUTHORITY.

Where an owner of real estate authorizes a person to write to an agent, authorizing the agent to sell the real estate, and the letter is so written, and the agent does sell such real estate, and afterward the owner of the real estate disputes the power of the agent to sell the same; *held*, that it is misleading and erroneous for the court to instruct the jury that "a delegated authority to an agent to sell real estate can not be re-delegated—or, in other words, one agent can not re-delegate the authority to perform the subject-matter of his agency." *Gross v. Schaffer*, S. C. Kan.

3. AGENCY—PAYMENT OF DEBT TO AGENT BY HIMSELF.

A creditor can not lawfully pay himself with the debtor's money without the debtor's consent, either express or implied; and when the debtor delivers him money for a purpose which negatives the idea of payment, the creditor's control is limited to the purpose declared. Where a superintendent of two railroad companies, each of whom pays one-half of his salary, receives money from one of such companies to pay its laborers, he can not appropriate such money in payment of arrears of his salary then due from the other company; nor can salary due from the other company be made a set-off in an action by the company that pays the money to recover the amount so paid from the superintendent. *Detroit, etc. R. Co. v. Smith*, S. C. Mich., Feb. 27, 1883; 15 N. W. R., 39.

4. AGENCY—RATIFICATION OF UNAUTHORIZED INDORSEMENT.

The action was on notes purporting to be indorsed by Mullaney & Hays in their firm name, the indorsement being made by a brother of Mullaney in the absence of the firm and without their knowledge or consent. The maker and all the other parties had been previously associated in business, and there was an unsettled claim in favor of Dennis Mullaney (who signed the firm name to the notes) against the old firm. Dennis was employed in various ways at the business place of Mullaney & Hays, collecting money for them, receipting for express matter, etc. After the firm learned of the action of Dennis, they did not take positive steps to disaffirm his action, and some ninety days afterward said firm, the maker of the note and Dennis had a settlement of their old partnership affairs, the firm giving their note to Dennis for $1,000 for a balance due him. This evidence was sufficient to show a ratification of the action of Dennis by the firm, even if it be admitted that Dennis was not originally authorized as agent to sign the firm's name. *Mullaney v. First Nat. Bank*, S. C. Ind., March 15, 1883.

5. CONTEMPT—RESTRAINT OF THREATENED CONTEMPT, BY INJUNCTION.

To publish and circulate during the progress of an action, a copy of the pleadings in the action with comments depreciating the case of one of the parties, is a contempt of court, and calculated to prejudice the fair trial of the action, and such contempt, if threatened to be committed, will be restrained by injunction. *Kitcat v. Sharp*, Eng. High Ct., Dec. 14, 1882.

6. CONVEYANCE—IMPERFECT ACKNOWLEDGMENT—MARRIED WOMAN'S DEED.

1. Where the deed of a married woman, whereby she seeks to convey her separate property, contains the name of herself only as the grantor, and her husband is not named in the body of the deed, but signs the deed with her, and both duly acknowledge its execution, this is a sufficient assent and joining with her under the statute to convey the property of the wife. 2. The acknowledgment of a married woman of the execution of a deed conveying her separate property, which acknowledgment states that she made herself a party to the deed "for the purpose of relinquishing her right of dower" in the lands described, she having no right of dower, present or prospective, but an estate in fee, must be considered and construed to be an acknowledgment of the due execution according to the import of the language of the deed. 3. When a bill is filed to reform a deed or perfect a title, it being alleged that there are imperfections in the deed which render the title precarious, and it appears that the defects in the deed are not material, but that it conveys a good title in law, the bill is demurrable for want of equity and should be dismissed. *Evans v. Summerlin*, S. C. Ga., January Term, 1883.

7. CRIMINAL PRACTICE—ARGUMENT—EVIDENCE.

In his closing argument to the jury, the district attorney was permitted by the court—notwithstanding the objection and exception of defendant—to aver, and argue from, the existence of facts as to which no evidence had been offered or introduced. *Held*, error sufficient to warrant a new trial. The court below ruled the district attorney was justified in departing from the testimony, because counsel for defendant had done the same thing. But *held*, on appeal, if the record showed (which it does not) that such statements had been made by counsel for defendant, the fact would not cure the error of the court. *People v. Mitchell*, S. C. Cal., Dec. 20, 1882; 3 Ohio L. J., 489.

8. DIES NON—SUNDAY NEWSPAPER—SHERIFF'S ADVERTISEMENT.

The question presented is, whether sheriff's sales can be legally advertised in papers issued on Sunday. Advertising sales is a part of the ordinary duties of the sheriff, and he can not transact the ordinary business of his office on Sunday. The publisher of a Sunday paper undertakes to circulate his paper on that day to subscribers and customers, and as the publishing of such a paper is his vocation, it follows that he engages in it when he circulates the paper owned by him. If a sher-

iff were permitted to aid in the violation of a statute by employing the violator to publish legal notices, we should have the singular anomaly of the chief ministerial officer of the county encouraging the violation of a law which it is his sworn duty to enforce. The printing of such a paper is work that may be done on a day other than Sunday; but the circulation of the paper is a work that is necessarily done on Sunday, and this is the most important part of the work. The owner of a Sunday paper is pursuing his ordinary vocation when he is engaged in circulating his paper, and thus transgresses the law. *Shaw v. Williams*, S. C. Ind., March 15, 1883.

9. EVIDENCE—MEDICAL EXPERT.

It is not a valid objection to the testimony of a medical expert, that he has but little knowledge on the subject upon which he is examined, except that derived from books, as he is entitled to speak from the accepted facts of medical science. It is not proper, on cross-examination, to ask a medical expert if he is acquainted with a certain book, and, calling his attention to a certain paragraph, ask a question in the language of the book, and thus indirectly introduce such passage in evidence. *Marshall v. Brown*, S. C. Mich., Feb. 27, 1883; 15 N. W. R., 55.

10. EVIDENCE—PECUNIARY STANDING OF DEFENDANT.

Where a physician sued to recover for services rendered to an adult daughter of defendant, who was sick at her father's house, but had worked out for several years previous, on her own account, it was error to admit testimony as to the property owned by defendant and its value. Such evidence could only have been introduced for the purpose of showing that defendant was able to and therefore ought to pay the bill, and the question of his liability could not be thus determined. *Small v. Smith*, S. C. Ind., March 15, 1883.

11. EVIDENCE—PROFERT OF THE PERSON IN CIVIL DAMAGE CASES.

On trial, in an action for damages for personal injuries of a permanent as well as temporary character to the plaintiff's eyes, where the plaintiff himself testified concerning his injuries, and n physician or surgeon or medical expert was examined as a witness in the case, the plaintiff may be required by the court, upon a proper application being made therefor by the defendant, to submit his eyes to a reasonable and proper examination by some competent expert, for the purpose of ascertaining the nature, extent and permanency of his injuries; the court exercising in all such cases a sound judicial discretion. *Atchison, etc. R. Co. v. Thul*, S. C. Kan.

12. HUSBAND AND WIFE—DEED TO BOTH JOINTLY—SURVIVORSHIP.

When land is granted to husband and wife, and their heirs and assigns, they do not take by moieties, but are seized of the entirety; the survivor takes the whole, and during their joint lives neither can alien so as to bind the other. After the death of the party named as the wife in a deed to husband and wife and their heirs, a conveyance by the husband conveys the whole estate, and the heirs of the wife can not show by parol evidence, in an action of ejectment against the grantee of the husband, that in fact the parties were not husband and wife, and that they were tenants in common. First, because this is inconsistent with the Statute of Frauds (Comp. Laws, sec. 4692); second, because the legal effect of the deed can not be contradicted by parties or privies in any collateral matter by parol evidence; and third, because a party can not claim, under one provision or implication in a deed or other instrument, by ignoring or contradicting another provision or implication which is destructive or fatally repugnant. *Jacobs v. Miller*, S. C. Mich., Feb. 27, 1883; 15 N. W. R., 42.

13. HUSBAND AND WIFE—WIFE'S AGENCY.

A wife is not, simply because she is a wife, authorized to sell or trade the property of her husband, although such property consists in a sewing machine kept in the house and used exclusively by herself. *Wheeler & Wilson Mf'g Co. v. Morgan*, S. C. Kan.

14. INFANCY—SUITS AGAINST INFANTS—GUARDIAN AD LITEM—SERVICE OF PROCESS—DEFAULT.

1. In a suit in equity against infants, process should be served upon them and a guardian *ad litem* appointed by the court to defend them, notwithstanding their legal guardian is also a party. 2. Where a general guardian appears and makes the defense required by law, and is heard by the court as the representative of the infant, such action is equivalent to his appointment as guardian *ad litem;* but the cause should not be heard without answer in behalf of infant defendants. 3. There can be no default taken against infant defendants. *Thompson v. McDermott*, S. C. Fla., January Term, 1883.

15. LANDLORD AND TENANT—REMOVAL OF FIXTURES.

A tenant for years who erects fixtures for the benefit of his trade or business, may, at any time during the term, remove them from the demised premises, but can not after the expiration thereof, unless he remain in possession and hold over so as to create an implied renewal of the lease. The refusal of the owner of the premises, after he has taken possession thereof, to permit the former tenants to remove the fixtures which they have attached to the premises during the term, does not enable the latter to maintain trover against the owner of the freehold. *Darrah v. Baird*, S. C. Pa., Nov. 20, 1882; 40 Leg. Int., 121.

16. MASTER AND SERVANT—PERSONAL INJURY—FELLOW-SERVANT.

Where an injury is caused to a workman in a mine by reason of the negligence of one who is not in any true sense a mere foreman or department leader or sub-chief in a given sphere of mining operations, but whose agency covers the entire mine and the entire control of the work, such negligence is not the negligence of a fellow-servant, but is to be considered as the negligence of the owner of the mine, and he will be liable therefor whether such agent was appointed directly by him or by his general agent. *Ryan v. Bagaley*, S. C. Mich., Feb. 27, 1883; 15 N. W. R., 72.

17. SET-OFF—UNLIQUIDATED DAMAGES—NOTE.

In an action on a promissory note, defendant can set off a claim against plaintiff for damages done to defendant by plaintiff while he, plaintiff, was employed as engineer for defendant. *Nixon v. McCrory*, S. C. Pa., Nov. 20, 1882; 40 Leg. Int., 121.

18. TRUST—TRUSTEE CHARGED WITH COMPOUND INTEREST.

1. Only in cases of fraud or flagrant breach of trust will a guardian be charged with compound interest on moneys of his ward in his hands. But if,

even without fraud or wilful disregard of duty, he fails to invest such moneys when he should do so, he will be charged with simple interest at the legal rate. 2. Whether, in such case, the guardian should be charged with interest from the time he receives the moneys, or only after the expiration of a certain time (as six months), in which to make the investment, and whether, for the purpose of computing interest, the expense of the maintenance of the ward for each year should be deducted at the commencement of the year from the amount of the estate in the hands of the guardian, are matters resting in the sound discretion of the court. 3. Where the expenditures for maintenance of the ward exceeded in each year the interest on the moneys in the guardian's hands, annual rests should be made in the computation of interest and deduction of such expenditures during the period of such maintenance, and the guardian should be charged with simple interest on the balance in his hands when he ceased to maintain the ward, to the date of the accounting. 4. Under the circumstances of this case (including an overcharge in the guardian's accounts evincing an entire disregard of the rights of the ward), an error, in the statement of the account by the court below, amounting to $11.35 in favor of the ward, is disregarded on appeal by the guardian. *Mather v. Heath*, S. C. Wis., Feb. 20, 1883; 15 N. W. R., 126.

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NOTES.

——I hate lawyers; they do more mischief than their heads are worth; they cause disorder, demoralize every form of equality, and are the chief obstacles to good government. If A lets B have his property without payment, I do not see why C, D, E, F, and all the rest of the alphabet should be called upon as a police force to get it back! No such thing should be attempted by law. It is the most monstrous innovation upon man's honor and integrity that was ever forced into the commerce of the world. Let a man trust another at his own risk. Even the gambler pays his debts contracted at the gambling table. He is not obliged to pay, but he considers them debts of honor. Abolish all laws for the collection of debts, and thus abolish the whole credit system; this is the only safe, true basis; that would abolish most lawyers, and all of the pawnbrokers' trade which now controls the commerce of America.—*Horace Greeley.*

——Chief Justice Sharswood, of Pennsylvania, said, in a speech at a Philadelphia banquet, given in honor of his retirement from the bench: "Indeed, it may be questioned whether great learning is a desirable quality in a judge. He is apt to wish to display it on all occasions by elaborate and tedious opinions, and delivering charges unintelligible to juries."